

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.674 of 1985

Against the judgment and decree dated 6.9.1985 passed by 4th Additional Subordinate Judge, Sasaram Rohtash in Title Suit No. 149 of 1980/ 50 of 1983.

=====

Ram Chander Chourasia & Ors

.... Defendants-Appellants

Versus

Bijay Das & Ors

.... Plaintiffs-Respondents

=====

Appearance :

For the Appellants : Mr. Devendra Kumar Sinha, Sr. Advocate.
Mr. Bajrangi Lal, Advocate, with him.

For the respondent No.3 : Mr. Ashutosh Ranjan Pandey, Advocate.
Mr. Ramanuj Tiwari, Advocate.

For the respondent
Nos.1, 2, 4 and 5 : Mr. Dhananjay Kumar Singh, Advocate.
Mr. Ajay Kumar Tiwari, Advocate.

=====

CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO
CAV JUDGMENT

Date: 26-02-2013


Mungeshwar 1. The defendants appellants have filed this first appeal against
Sahoo, J.

the judgment and decree dated 6.9.1985 passed by the learned 4th
Additional Subordinate Judge, Sasaram, Rohtash in Title Suit No.
149 of 1980/ 50 of 1983 whereby the court below decreed the
plaintiffs respondents' suit. The sole plaintiff respondent died during
the pendency of the appeal and his legal representatives have been
substituted in his place.

2. The plaintiff respondent had filed the aforesaid suit for
declaration of his title and confirmation of possession with respect to

12 decimal of C.S. plot No. 274 corresponding to R.S. plot No. 493. Alternatively, he also prayed for recovery of possession and injunction.

3. The plaintiff respondent claimed the aforesaid relief alleging that C.S. plot No. 272 of C.S. Khata No. 775 belonged to Jhauri Ram. On 24.5.1919 he sold C.S. plot No. 272 to Ganesh Lal. Subsequently, Ganesh Lal by registered sale deed dated 19.9.1919 sold the same to Most. Sudeshi Kuer who was plaintiffs' grandmother. The plaintiffs' grandmother Sudesi Kuer executed a registered deed of gift dated 12.1.1948 in favour of plaintiff with respect to her land. According to the plaintiffs in fact Ganesh Lal had purchased 1 Bigha 5 kattha but in the sale deed it has been wrongly mentioned as 1 bigha (62 decimal) because generally the land was known as 1 bighwa land, the intention of the parties was sale and purchase of 1 bigha 5 kattha. Since there was mistake in the sale deed in favour of Ganesh Lal, the same was repeated in subsequent sale deed and the gift deed. This mistake is apparent from the sale deed of Ganesh Lal. In the eastern boundary he would have mention plot No. 274 which belonged to him but he has mention "land of Sitaram". The orchard of Sitaram was in plot No. 290. Therefore, it shows that he has also sold plot No. 274 to Ganesh Lal. After purchase Most. Sudesi Kuer had constructed a lord Shiva



temple and a well is dug. 12 to 14 years ago the plaintiff got a brick klin on it. However, the survey authority have open a khata in the name of plaintiff only for 67 decimal instead of 78 decimal and carved out 12 decimal on plot No. 274 in the name of the defendant No.1.

4. The defendants filed the contesting written statement alleging that Jhauri Barai was the owner of the land. He died in joitness with his son and grandson. He only sold 1 bigha land of plot No. 272. No portion of C.S. plot No. 274 measuring 12 decimal was ever sold to Ganesh Lal by Jhauri. Therefore, there is no question of possession of Ganesh Lal over 12 decimal of plot No. 274 arises. Likewise the sale of 12 decimal of plot No. 274 with 1 bigha of plot No. 272 by Ganesh Lal to Most. Sudeshi does not arise. When Ganesh Lal had no possession and title over 12 decimal of plot No. 274 no title conferred on Most. Sudeshi therefore, she could not have executed the gift deed for 12 decimal of plot No. 274. In fact the description in the eastern boundary in the sale deed is wrong and the wrong entry will never create title over plot No. 274. Finding the possession of the defendant the survey authorities have recorded the name of the defendant over 12 decimal of C.S. plot No. 274.

5. On the basis of the aforesaid pleadings, the following issues were framed :

“(I) Is the suit as framed maintainable ?

(II) Has the plaintiff got cause of action and right for the suit ?

(III) Is the suit barred by law of limitation ?

(IV) Is the plaintiff case that on 24th May 1919 Jhauri Ram also sold 12 decimal of C.S. Plot No. 274 along with 1 bigha of C.S. Plot No. 272 to Ganesh Lal true ?

(V) Is the plaintiff case that after the purchase on 9.9.1919 this Ganesh Lal also sold 12 decimal of C.S. plot No. 274 to Mosmat Sudesi Kuar true ?

(VI) Is the plaintiff case that Ganesh Lal and after him Mosmat Sudesi Kuar and after execution of the deed of gift by Mosmat Sudesi Kuar in favour of the plaintiff. The plaintiff got title and possession over 12 decimal of C.S. plot No. 274 also true ?


(VII) Is the defendants case that Jhauri Ram only sold one Bigha of C.S. Plot No. 272 to Ganesh Lal is true ?

(VIII) Is the plaintiff entitle to get any relief, if so, to what relief ?”


6. After trial the lower court found that the defendant has not examined any person of the family of the ex-landlord nor he has brought counter foil of the rent receipt to show that 12 decimal of plot No. 274 was in possession of the family of the defendant after abolition of the Zamindari and accordingly, issue Nos. 4 and 5 were decided in favour of the plaintiff. The trial court also while deciding issue No. 5 and 6 found that the plaintiff has got title and possession

over the suit land and the entry made in revisional survey in respect of the suit land is not correct. Accordingly, decreed the plaintiffs' suit.

7. The learned senior counsel Mr. Devendra Kumar Sinha appearing on behalf of the appellants submitted that the original sale deed is dated 24th May 1919 executed by Jhauri Ram in favour of Ganesh Lal with respect to 1 bigha of C.S. plot No. 272 only. The plaintiff has filed this suit for declaration of title with respect to 12 decimal of land of plot No. 274. According to the plaintiffs' case by mistake in the sale deed in place of 1 bigha 5 kattha it has wrongly been mentioned only one bigha. The intention of the parties was to sell and purchase of 1 bigha 5 kattha. According to the learned counsel in the sale deed Ext. 3/A and the subsequent sale deed and also the registered gift deed the description of the land is mentioned clearly to be 1 bigha of C.S. plot No. 272. There is no ambiguity in the area of the land and the plot number also. When there is no ambiguity regarding the plot number and the area by oral evidence only the terms and conditions and the area cannot be varied in the registered sale deed of the year 1919. Moreover, subsequently the sale deed was executed by Ganesh Lal in favour of grandmother of the plaintiff wherein also the area and plot number has been mentioned as 1 bigha of C.S. plot No. 272. In the gift deed also



which is executed by grandmother of the plaintiff in favour of the plaintiff it is mentioned 1 bigha of C.S. plot No. 272. The court below has gravely erred in recording a finding that 12 decimal of plot No. 274 was also sold by Jhauri in favour of Ganesh Lal. The learned counsel further submitted that when the terms and conditions have been clearly mentioned in the document the court could not have supplied implied meaning for varying the terms and conditions on the basis of oral evidence only. The oral evidence is entirely inadmissible in view of Section 91 and 92 of the Evidence Act. Likewise the case of the plaintiff that in fact 1 bigha 5 kattha was sold is also not acceptable because of the fact that only 62 decimal has been sold which is equal to only 1 bigha. The plaintiff respondent is taking undue advantage of the mistake in the description of the sale deed regarding the boundary of the plot in the eastern boundary. The learned court below has also wrongly applied the decision of the Apex court reported in **AIR 1963 SC 1879**. The lower court also placed the onus on the appellants to prove the fact that the appellants are in possession of the property. According to the learned counsel since the suit was filed for declaration of title and confirmation of possession/ recovery of possession the burden was on the plaintiff to prove his title over the suit property. However, the plaintiff only produced the sale deed wherein it is




clearly mentioned that Jhauri sold 1 bigha of C.S. plot No. 272 which was again sold by Ganesh Lal in favour of grandmother of the plaintiffs in the year 1919 itself wherein also 1 bigha of plot No. 272 has been mentioned. By registered deed of gift of the year 1948 the grandmother gifted the property wherein also this land purchased by her was gifted to the plaintiffs. Except these sale deeds and gift deed no title document has been produced by the plaintiffs. So far the possession is concerned on the basis of possession only no title will be created in favour of the plaintiffs. The survey authorities in the recent survey have found the possession of the plaintiffs. On these grounds, the learned counsel submitted that the impugned judgment and decree are liable to be set aside and the plaintiffs' suit be dismissed.

8. On the other hand, the learned counsel for the respondents submitted that the lower court has considered the matters in *ex tenso* on the evidences produced by the parties and recorded the finding that the suit land was also sold by the original owner Jhauri in favour of Ganesh but there was mis-description in the area and plot. In such circumstances, the trial court on the basis of evidences recorded the finding that the suit land was in fact sold and Ganesh Lal came in possession which was sold by him in favour of grandmother of the plaintiffs. The grandmother of plaintiffs gifted the same to the

plaintiffs. Therefore, the trial court has rightly decided the issue Nos. 4 and 5 in favour of the plaintiffs. The learned counsel further submitted that the learned court below has relied upon a decision of the Apex Court reported in AIR 1963 SC 1879 and page 361. On these grounds, the learned counsel submitted that the first appeal is liable to be dismissed.

9. In view of the above rival contentions of the parties, the points arise for consideration in this appeal are as to whether the owner Jhauri Ram had sold 1 bigha of C.S. plot No. 272 only or he has sold the suit property comprised within C.S. plot No.274 and whether the plaintiff has been able to prove his title over the same and whether the impugned judgment and decree is sustainable in the eye of law ?

10. The simple case of the plaintiffs is that Jhauri Ram son of Babu Ram had sold on 24th May 1919 C.S. plot No. 272 to Ganesh Lal measuring 1 bigha land but in fact he had sold 1 bigha 5 kattha of plot No. 272 and plot No.274. That was the intention of the parties. On the contrary, according to the defendants appellants only 1 bigha of C.S. plot No. 272 was sold and not 12 decimal of plot No. 274. In support of their respective case the parties have produced oral as well as documentary evidences. So far the oral evidences are concerned, the plaintiffs' witnesses i.e. PW 5 to 9, 12 and 13 have




stated that plot No. 272 measures 1 acres 21 decimal which was sold by Jhauri in favour of Ganesh Lal, who in turn sold the same to Sudesi Kuer, who gifted in turn to plaintiffs by registered gift deed. On the other hand, the defendants' witnesses i.e. DW 5, 7, 17 have admitted the fact that Jhauri Ram had sold to Ganesh Lal. After purchase the purchaser came in possession of the land. From the oral evidences discussed above, it is clear that the witnesses of the plaintiffs supported the plaintiffs' case. Likewise the witnesses of the defendants although admitted about sale of Jhauri in favour of Ganesh but so far the lands which were sold will be evident from the registered sale deeds and gift deeds. On the basis of these oral evidences the area and plot number cannot be ascertained.

11. Ext. 3/A is sale deed executed by Jhauri Ram in favour of Ganesh Lal which is dated 9.9.1919 it becomes clear that 1 bigha of C.S. plot No. 272 with specific boundary was sold in favour of Ganesh Lal. There is no ambiguity in the sale deed. Likewise in Ext. 5 the registered gift deed the description has been mentioned as 1 bigha of C.S. plot No. 272. It may be mentioned here that so far this position is concerned, it is admitted fact. There is no ambiguity in terms and conditions of the sale deed. Now therefore, the question arises as to whether on the basis of oral evidences adduced by the plaintiff can the terms and conditions regarding area and plot


number be varied.

12. So far the decision relied upon by the trial court i.e. **AIR 1963 SC 1879 Shedhyan Singh vs. Most. Sanichara Kuer** is concerned, the Apex Court has held that the mistake in the plot number must be treated as mis-description which did not affect the identity of the property sold. The learned counsel for the respondents submitted that here also there is mistake in the description of area and plot number but when there is difference between the plot number and the area the boundary given will prevail. So far this submission is concerned, I do not agree because in the case relied upon i.e. *Shedhyan Singh (supra)* from the fact it appears that only plot number was mentioned as 160 in place of 1060 and the other description regarding khata number and boundaries were correct. In such circumstances, the Apex Court held that the plot number is mis-description. In the present case at our hand, here there is no mis-description. It is specifically mentioned 1 bigha and plot number is 272. Khata number is also correctly mentioned. In such circumstances can it be said that the owner Jhauri Ram also sold 12 decimal of plot No. 274, merely because there may be some mis-description of the boundary of the land sold. In the case of **Ramkishorelal and another vs. Kamalnarayan AIR 1963 SC 890** the Apex Court has held as follows :




“The golden rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words, in their ordinary, natural sense. To ascertain this intention the Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used. Very often the status and the training of the parties using the words have to be taken into consideration. It has to be borne in mind that very many words are used in more than one sense and that sense differs in different circumstances. Again, even where a particular word has to a trained conveyancer a clear and definite significance and one can be sure about the sense in which such conveyancer would use it, it may not be reasonable and proper to give the same strict interpretation of the word when used by one who is not so equally skilled in the art of convincing.”

13. So far this decision of the Apex Court is concerned, it is five judges bench decision, which is being followed till today. As has been admitted by the parties there is no ambiguity either in the area of the land sold or in the plot numbers. When there is no ambiguity the Court cannot supply any external fact and the oral evidence contrary to explain the same will be inadmissible. Now let us assume that there was some mistake but the mistake could have been




corrected only by the executant of the said sale deed that is by Jhauri and not by any other. The sale deed was again executed by Ganesh in favour of Sudeshi the grandmother of plaintiff. Admittedly in this document also the area has been mentioned one bigha in C.S. plot No. 272. In the gift deed Ext.5 also Most. Sudesi described the area as one bigha of C.S. plot No. 272, this gift deed is of the year 1948. Now therefore, on the basis of oral evidence only no inference can be drawn or no finding can be recorded that in fact one bigha 5 kattha of plot No. 272 was sold by Jhauri. Moreover, there is nothing on record to show that what is the area of plot No. 272, as according to the plaintiff himself the plot was known 1 bighwa land. Even if it is found that the said plot measures 1 bigha 5 kattha then also now after such a long period on the basis of oral evidence there cannot be any presumption that in fact 1 bigha 5 kattha was sold. In the present case at our hand in the revisional survey the survey authorities found the possession of the defendants appellants with respect to the suit plot i.e. 12 decimal in C.S. plot No. 274 and it has been carved out and recorded in the name of the defendants. In **AIR 1963 SC 361 Sri Raja Durga Singh of Salon vs. Tholu** the Apex Court has held that where the entries in the record of right are relied on and there is a conflict between them, it is the later entry which must prevail.

14. From perusal of the impugned judgment it appears that the



trial court has discussed the evidences of the defendants on the question of sale and possession of the suit land and on the basis of the evidence recorded the finding that the defendants are not in possession of the property. So far this finding is concerned, from perusal of the judgment it appears that the trial court considered some of the portions of the cross-examination only wherein the witness i.e. DW 12 at paragraph 11 has stated that he is unable to say that the suit land was sold or not and likewise he is unable to prove the case of partition alleged by the defendant, DW 7 paragraph 13, DW 4 that he is unable to say if there is any idol in the temple and likewise DW 5 and disbelieved them. Even if it is found that the plaintiff is in possession of the suit land then also on the basis of his possession he will not acquire any title because only 1 bigha was sold by registered sale deed Ext.3/A on 9.9.1919. The said land was sold by Ganesh to the grandmother of the plaintiff and grandmother of the plaintiff gifted the same to the plaintiff.

15. The learned counsel for the respondents submitted that the same is in possession of the plaintiffs since long therefore, the plaintiffs have acquired title even by adverse possession. So far this submission is concerned, it may be mentioned here that there is neither any specific pleading nor evidence to this effect. For proving the acquisition of title by adverse possession the plaintiff must plead



and prove since when he started prescribing title by adverse possession. For constituting adverse possession there must be a corpus posidandi coupled with animus posidandi. In other words, there must not only be intention to possess but there must be also the intention to dispossess the real owner. Merely because of long possession it cannot be said that the plaintiffs have acquired title by adverse possession.

16. From perusal of the impugned judgment it appears that the trial court has much emphasized on the evidences of the defendants and found fault on unacceptable grounds. Likewise the trial court also considering the description in the eastern boundary in Ext. 3/A presumed that in fact the suit land was also sold. Without considering the fact that the sale deed is of the year 1919 and the gift deed is also of the year 1948. In other words what is not there in the sale deed has been presumed by the court on the basis of oral evidence without considering the settled principles of law laid down by the Apex Court. In my opinion, therefore, the decision of the lower court is unsustainable in the eye of law.

17. In view of my above discussion, I find that the plaintiffs have failed to prove their title and possession over the suit land. Accordingly, the finding of the trial court is hereby reversed.

18. In the result, this first appeal is allowed. The impugned judgment and decree are set aside with cost of Rs.10000/- to be paid by the respondents to the appellants within two months, failing which the appellants are at liberty to realize the same with the process of the court.

Patna High Court,
Patna.

Date : 26.02.2013
S.S.

(Mungeshwar Sahoo, J.)